

TABLE OF CONTENTS

TABLE OF CONTENTS	i
I. THE COMMISSION MUST ENSURE THAT A REVISED PER-PHONE RATE IS FAIR TO PSPs	1
A. Unfairness in the Compensation System Generally	2
B. Unfairness of the Per-Phone Rate	5
II. DISCUSSION	7
A. The Commission Should Prescribe A Per-Phone Rate That Is No Lower Than 96 Calls Per Payphone Per Month	7
B. A 40-Second Hold Time May Be A Reasonable Surrogate For Estimating Call Completion <i>For Access Code Calls</i>	10
C. A Decision On How To Combine Disparate Estimates Of Average Per-Payphone Call Volumes Should Be Made In Light Of The Data Submitted ..	13
D. If The Commission Sets More Than One Per-Phone Rate, Each Rate Must Be Adequately Be Supported By Credible Data	13
E. Currently, Approximately Five Percent Of Independent Payphones Receive Surrogate Payments.....	14
III. THE COMMISSION SHOULD CLARIFY THAT THE PER-PAYPHONE RATE AUTOMATICALLY CHANGED WHEN THE COMMISSION REVISED THE PER-CALL RATE	14
CONCLUSION	17

SUMMARY

APCC does not oppose resetting the per-phone compensation rate; however, the Commission must be especially careful to ensure that a revised per-phone rate is fair to payphone service providers ("PSPs"). In the past, PSPs have not been fairly compensated. Under the compensation system generally, PSPs have been systematically underpaid and unfairly treated in numerous respects, due to regulatory lag and because carriers largely control the compensation process. Moreover, the per-phone rate, as well as the compensation system generally, has been established and applied in ways that are unfair to PSPs. Carriers, rather than applying uniform "business rules," change their rules when the per-call and per-phone rates change relative to each other, in order to ensure that they are always paying PSPs the lowest possible average rate. In setting a revised per-phone rate – which is currently received by about five percent of independent payphones -- the Commission should be especially vigilant to ensure that this aspect of the compensation system does not continue to be a source of unfairness to PSPs.

In order to provide new information sought by the Commission on the average number of dial-around calls per payphone (*Further Notice* ¶ 12), APCC has analyzed dial-around payments received by its dial-around compensation clearinghouse, APCC Services, Inc., for calls completed during the two-year interval from July 1, 2002, to June 30, 2004. For this period APCC Services, Inc., collected per-call compensation for an average of about 328,000 payphones, or approximately 60% of the total number of independent payphones deployed during that period. Therefore, the average payments received by these payphones provide a highly reliable indicator of the average per-call payments for the independent payphone industry as a whole.

On average, for calls made from these 328,000 payphones during the two-year period, APCC Services collected actual per-call compensation payments for about 96 calls per payphone per month. This average of 96 *paid* calls per month is a very conservative estimate of the average number of *completed* calls, because a significant number of calls go unpaid. The Commission should ensure that independent PSPs receiving per-payphone compensation are compensated for no fewer than 96 calls per payphone per month.

The paid call data reported by APCC do not require any correction by means of timing surrogates. In cases where call data does not indicate whether calls are actually completed, a 40-second timing surrogate can be reasonable for application to access code calls, but not for application to subscriber toll-free calls, which are virtually always answered and which can be of extremely short duration.

In its decision setting a revised per-payphone compensation rate, the Commission should also address a currently disputed issue as to the amount of the *current* per-payphone rate. A number of carriers have continued to pay a per-payphone rate based on the old \$.24 per-call rate, even after the new per-call rate of \$.494 per call became effective.

In APCC's view, the Commission made clear in the *Fifth Order on Reconsideration* that each carrier's per-phone compensation rate is calculated by multiplying the carrier's market share percentage stated in Appendix C of the *Fifth Order on Reconsideration* by the applicable per-phone compensation rate. The per-phone compensation rate, in turn, is calculated by multiplying 148 (the amount of calls per phone) times the applicable per-call rate (currently \$.494). *Id.* ¶ 51. In its order adopting the \$.494 per-call rate, the FCC made clear that the new rate was a component

of the per-phone rate. *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, ¶ 91 (2004).

When the Commission formally corrected one component of the rate, that necessarily altered the per-phone rate to the extent of the change in that one component.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Request To Update Default

Compensation Rate For

Dial-Around Calls From Payphones

)

)

)

)

)

)

)

)

WC Docket No. 03-225

**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

The American Public Communications Council ("APCC") hereby submits comments in response to the Commission's further notice of proposed rulemaking in this matter.¹ In the *Notice*, the Commission proposes to update the per-phone rate of dial-around compensation that applies when carriers do not track payphone calls and thus do not pay compensation on a per-call basis.

I. THE COMMISSION MUST ENSURE THAT A REVISED PER-PHONE RATE IS FAIR TO PSPs

APCC does not oppose resetting the per-phone compensation rate; however, the Commission must be especially careful to ensure that a revised per-phone rate is fair to payphone service providers ("PSPs"). In the past, PSPs have not been fairly

¹ *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Further Notice of Proposed Rulemaking, FCC 05-71 (rel. March 14, 2005) ("*Further Notice*").

compensated. This unfairness characterizes the compensation system in general and the per-phone rate in particular.

A. Unfairness in the Compensation System Generally

Under the compensation system generally, PSPs have been systematically underpaid and unfairly treated in numerous respects. First, the compensation system itself has a built-in bias in favor of the carriers that makes it very difficult for PSPs to collect the full amount owed. Under the compensation rule, the carriers are initially responsible for determining how many payphone calls they complete and coming forward to make payment for those calls. *See* 47 CFR § 64.1310(a). Moreover, even if PSPs could identify all non-paying carriers and instances of non-payment, PSPs have no ability to “cut off service” to carriers who fail to make any payments or who pay for less than the correct number of calls. Thus, carriers are in control of the call tracking process and the compensation payment process.

Second, under the original “tollgate” rule,² which was in effect from October 1997 to November 2001, compensation payment responsibilities were assigned to hundreds of switch-based resellers (“SBRs”) who had no incentive to “step forward” and pay, without any effective safeguards to enable PSPs to identify and collect compensation from non-paying SBRs. As a result, the Commission has found that there was a major “shortfall” in PSPs ability to collect the dial-around compensation they were owed during the 1997-2001 period.

² *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233 ¶ 92 (1996) (“*First Payphone Reconsideration Order*”).

Third, even after the second “tollgate” rule took effect in November, 2001,³ PSPs were not able to collect the full amounts of compensation they were due and were subjected to unfair carrier practices. Facilities-based carriers, who had compensation responsibility, adopted the practice of “taking back” compensation after it was paid (by subtracting the “takeback” from subsequent compensation payments), based on unproven claims by SBRs that a substantial portion of calls for which PSPs were initially compensated had not been completed. For most of these takebacks, PSPs had no advance notice and no opportunity to dispute the claim. As a result, PSPs lost millions of dollars of previously paid compensation.

Fourth, due to “regulatory lag,” PSPs were saddled with an unreasonably low \$.24 per-call compensation rate for several years after it ceased to be a compensatory rate. The \$.24 rate was set by dividing fixed calls by the estimated call volume at a marginal payphone.⁴ In setting the rate the Commission used the marginal payphone call volume reported in 1998 – an estimated 439 calls per month. As the Commission’s orders make clear, however, payphone call volumes declined substantially after 1998, rendering the \$.24 dial-around rate noncompensatory virtually as soon as it took effect in April 1999.⁵ The noncompensatory \$.24 rate remained in effect from 1999 to

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098, recon. 16 FCC Rcd 20922 (2001), *rev’d Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 2550 ¶ 10 (1999) (“Third Payphone Order”).

⁵ By 2002, marginal payphone call volumes had declined to 191 calls per payphone per month. *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Report and Order, 19 FCC Rcd 15636 ¶ 80 (2004)

September 2004. In the latter part of that period the rate became so patently unfair that in August 2004, the Commission found it necessary to double the rate in order to ensure fair compensation for PSPs. *Compensation Rate Order* ¶ 1.

Fifth, even under the current rate and current “tollgate” rule,⁶ PSPs have great difficulty collecting the full amount of compensation owed. As discussed in more detail below, the initial experience under the new “tollgate” rule indicates that many carriers have yet to comply with the audit, data, and payment requirements of the order, and there are major inconsistencies in the data reported by those carriers that have attempted to comply. As a result, it is extremely difficult for PSPs to determine how much compensation has not been paid and to identify the carriers responsible for the shortfalls.

As explained above, many aspects of the compensation system that are not subject to PSPs’ control cause the system to operate unfairly to PSPs. In setting a revised per-phone rate, therefore, the Commission should be especially vigilant to ensure that this aspect of the compensation system is not yet another source of unfairness to PSPs.

(Footnote continued)

(“*Compensation Rate Order*”). Average call volumes per payphone also declined. For example, the *Further Notice* states that the average call volume at an RBOC payphone declined from 478 calls per month in 1998 to 190 calls per month in 2003.

⁶ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 20020-21 Appx. C (2003) (“*Tollgate Order*”) recon., FCC 04-251 (rel. October 22, 2004) (“*Tollgate Reconsideration Order*”).

B. Unfairness of the Per-Phone Rate

The purpose of the per-phone rate is to ensure that PSPs are fairly compensated when it is not possible to transmit the information digits that identify payphone calls for purposes of paying per-call compensation. While the payphone lines to which “dumb” payphones are connected have a hard-wired capability to transmit the required identifier, the payphone lines connecting to “smart” payphones do not have such a hard-wired capability. In order to transmit payphone-identifying digits from “smart” payphones, it is necessary for each interexchange carrier (“IXC”) to subscribe to a local exchange carrier (“LEC”) service called “Flex ANI.” This service is not available at all payphones, and even where available, Flex ANI digits are not always transmitted, because the service sometimes malfunctions and because IXCs sometimes fail to subscribe.⁷

The per-phone rate, as well as the compensation system generally, has been established and applied in ways that are unfair to PSPs. First, for many years the per-phone rate was set based on payments made from RBOC payphones, even though RBOC payphones are known to produce many fewer dial-around calls, on average, than independent payphones, and even though the bulk of the payphones that actually received per-phone payments were operated by independent PSPs.

Second, as with other aspects of the compensation process, the implementation of per-phone compensation is largely controlled by the carriers. In theory, per-phone payments are to be made only where per-call payment is impossible, but in practice,

⁷ See generally *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998 (Com. Car. Bur. 1998).

carriers have taken unto themselves wide discretion in determining whether to pay on a per-phone or per-call basis. For example, the Commission's Flex ANI orders *permit* carriers to elect to pay on a per-call basis, if it is feasible to do so, even where Flex ANI is unavailable. As another example, carriers generally use their own unilaterally developed "business rules" to determine whether to pay per-phone or per-call compensation, or a combination of the two, when Flex ANI is transmitted from a payphone for only a portion of a quarter. The orders require carriers to make these kinds of decisions uniformly, but such uniformity is difficult to enforce. And of course, there is a built-in incentive for carriers to make these determinations based on which form of payment will minimize payments to PSPs.

These carrier decisions can dramatically affect PSP compensation. When the Commission increased the per-phone compensation rate in the *Fifth Reconsideration Order*,⁸ thereby changing the "break-even" point for when a carrier is better off paying per-phone or per-call compensation, certain large carriers unilaterally altered their "business rules" so as to reduce the number of per-phone payments they made. As a result, the percentage of ANIs that were paid per-phone compensation dropped from 11.8% in third quarter 2003 to 4.3% in fourth quarter 2003, and have remained at the 4-5% level ever since. Thus, the carriers, rather than applying uniform "business rules," change their rules when the per-call and per-phone rates change relative to each other, in order to ensure that they are always paying PSPs the lowest possible average rate.

⁸ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002), *aff'd* AT&T v. FCC, 363 F.3d 504 (D.C. Cir. 2004).

The Commission must recognize that any revised compensation rate will be subject to similar carrier manipulations that are difficult for either the Commission or PSPs to effectively control to ensure fairness. Therefore, to the extent that there is uncertainty as to the appropriate per-payphone rate, the Commission should try to ensure that, if it errs, it errs on the side of ensuring that the rate is fair to PSPs.

II. DISCUSSION

A. The Commission Should Prescribe A Per-Phone Rate That Is No Lower Than 96 Calls Per Payphone Per Month

APCC agrees with the Commission's tentative conclusion that a revised rate of per-payphone compensation should be calculated by multiplying the average number of dial-around calls per payphone by the \$.494 per-call compensation rate. *Further Notice* ¶ 9. In order to provide new information sought by the Commission on the average number of dial-around calls per payphone (*Further Notice* ¶ 12), APCC has analyzed dial-around payments received by its dial-around compensation clearinghouse, APCC Services, Inc., for calls completed during the two-year interval from July 1, 2002, to June 30, 2004.

This period was chosen for analysis because it is long enough to provide meaningful data and because it is the most recent period for which there is reasonably reliable and more complete payment data. The two most recent periods for which payments have been received – covering the third and fourth quarters of 2004 – are too recent to have produced reliable payment data. Many carriers make late payments for some or all ANIs, and threats of litigation frequently result in substantial payments from carriers that initially evaded making any payments at all.

Moreover, the two most recent periods occurred immediately after the changeover to the new “tollgate” rule, which introduced new payment, auditing, and reporting requirements. *See* 47 CFR §§ 64.1310-1320. The initial experience under the new rule indicates that many carriers have yet to comply with the audit, data, and payment requirements of the order, and there is a considerable amount of inconsistency in the data reported by those carriers that have attempted to comply. As a result, hundreds of Completing Carriers that owe compensation to PSPs have not made any payments at all. In addition, the data reports provided by Intermediate Carriers, on which PSPs rely in order to identify non-paying and underpaying Completing Carriers, are rife with inconsistencies in format, major omissions of data, and demonstrable errors in content. These deficiencies make it extremely difficult for PSPs to determine how much compensation has not been paid and to identify the carriers responsible for the shortfalls. Until these compliance issues are resolved, it would be clearly unreasonable for the Commission to rely on data produced under the new “tollgate” rule for purposes of setting a per-phone compensation rate.

APCC reviewed and analyzed payment data for 100% of the payphones represented by APCC Services that were compensated on a per-call basis during each of the eight calendar quarters making up the period from July 1, 2002 to June 30, 2004. For this period APCC Services, Inc., collected per-call compensation for an average of about 328,000 payphones,⁹ virtually all of which are “smart” payphones. According to FCC statistics, these 328,000 payphones represent approximately 60% of the total number of

⁹ APCC excluded from this calculation any payphone that was compensated only on a per-phone basis.

independent payphones deployed during that period.¹⁰ Therefore, the average payments received by these payphones provide a highly reliable indicator of the average per-call payments for the independent payphone industry as a whole.

On average, for calls made from these 328,000 payphones during the two-year period, APCC Services collected actual per-call compensation payments for about 96 calls per payphone per month.

Average calls *paid*, however, are a very conservative estimate of the average number of dial-around calls *completed* per payphone per month. First, paid calls do not include any calls that were omitted from carriers' payments due to temporary Flex ANI failures, carrier tracking errors, incorrect definitions of "completed call,"¹¹ and the like. As noted above, carriers basically control the call tracking and counting process, and there is, of course, a built-in incentive for carriers to err on the side of undercounting calls. APCC Services and other PSP representatives have pending litigation against several major carriers involving alleged underpayments during the 2002-2004 period.

Second, the 96 calls number does not include calls completed by carriers who failed to make *any* per-call payments during some or all of the two-year period. For example, a number of carriers went bankrupt during this period and others simply failed to make any payments for certain quarters.

¹⁰ Industry Analysis Division, Wireline Competition Bureau, *Trends in Telephone Service*, Table 7.6 (April 2005)(showing that the total number of independent payphones declined from about 650,000 in 2002 to about 529,000 in 2004).

¹¹ APCC sought a clarification of the definition of completed call in order to close one loophole that APCC believes leads to underpayment, but the Commission declined to issue the ruling. *Tollgate Reconsideration Order* ¶¶ 39-41.

For these reasons, 96 calls is a very conservative estimate of the average number of dial-around calls completed from an independent payphone. Therefore, the Commission must ensure that independent PSPs receiving per-phone compensation are compensated for *no fewer* than 96 calls per payphone per month.

B. A 40-Second Hold Time May Be A Reasonable Surrogate For Estimating Call Completion For Access Code Calls

The Commission also inquires whether the data previously provided by the regional Bell Operating Companies (“RBOCs”) in the FCC’s true-up proceeding, or similar data, would be valid for purposes of setting an overall per-phone compensation rate. *Further Notice* ¶ 11. In that proceeding, the RBOCs provided the Commission with data on the completed calls routed to each IXC from payphones in their territory.

In APCC’s view, the Commission should certainly not rely exclusively on RBOC data for purposes of setting a per-call rate that is applicable primarily to independent payphones. APCC’s own payment data provide the most reliable basis for setting a per-phone rate applicable to independent payphones.

The Commission also inquires whether it is reasonable to apply a 40-second hold-time requirement to call counts derived from local network records in order to estimate the average number of completed dial-around calls. *Id.* ¶ 11. When the RBOCs submitted data in the true-up proceeding, they were not able to determine with certainty whether all the calls recorded in their data were completed. Therefore, the RBOCs used 40-second hold-time requirement as a “surrogate” for estimating whether calls were completed.

For purposes of the data that APCC reports in these comments, of course, a 40-second hold-time requirement would be inappropriate and irrelevant, because APCC’s

submission presents data on paid, actually completed calls. In the event that other parties submit data based on calls for which completion cannot be determined, however, APCC believes that, depending on the circumstances and how the method is applied, the exclusion of call durations less than 40 seconds can be a reasonable -- although very conservative -- method of estimating the number of completed calls dialed to *access code* numbers. This is because most access code calls involve the input of billing information and/or the dialing of a second number before the call is completed.¹² Forty seconds is more than ample time for consumers to complete the dialing sequence and for the call to connect and be answered. Few consumers will stand at a payphone for extended connect times. Today's modern digital networks and cross connects make call processing extremely rapid.

For subscriber toll-free numbers, on the other hand, it is clear for numerous reasons that a 40-second requirement would be *inappropriate*. First, subscriber toll-free calls do not involve a platform from which a "second" call is initiated. Therefore, the answer supervision signals that LECs receive for these calls are reliable indicators of whether the call is completed. Thus, LEC network reports and even some payphone-generated call detail reports frequently are able to differentiate calls for which answer supervision is received. In such reports, all the subscriber toll-free calls that appear will be completed calls, and there is no need for a surrogate at all.

¹² See 47 U.S.C. § 226(a)(1)(defining "access code"). This is not necessarily true, however, where the purpose of dialing the access code is to provide information to or obtain information from the carrier itself rather than to call an end user. *Tollgate Reconsideration Order* ¶ 39.

Second, even if answer supervision is not reflected in call detail reports, there is little if any need for a surrogate for subscriber toll-free calls. Very few subscriber toll-free calls go unanswered for forty seconds. Virtually all of these calls are to commercial enterprises. These merchants have an interest in making sure they do not lose a customer because a call is unanswered for very long. Devices such as uniform call distributors make sure incoming calls are efficiently routed and put in queue. Calls are virtually always answered within a few rings by at least a voice processor, if not a human responder. Therefore, there can be little, if any, need for a call completion surrogate of any significant duration.

Third, even if a surrogate was needed for subscriber toll-free calls, it would have to be much shorter than forty seconds. When subscriber toll-free numbers are dialed, there is no necessity for the caller to input billing information, and no need for the caller to dial a second number before the call is completed. Moreover, LECs do not begin timing these calls until the call reaches a network switch; thus, ringing begins almost immediately after timing of the call commences. Most consumers would not be willing to wait anywhere near forty seconds of ringing time before hanging up.

Finally, as carriers in this proceeding have previously pointed out, even once completed, these types of dial-around calls are frequently of very short duration. *See e.g., Third Payphone Order*, 14 FCC Rcd at 2586 ¶ 95 (discussing PageMart's assertion that most paging calls last less than 30 seconds). Therefore, a 40-second surrogate would incorrectly define many short-duration completed calls as "uncompleted".

For all these reasons, a 40-second requirement is reasonable only as a surrogate for completion of access code calls. It clearly cannot reasonably be applied to subscriber toll-free calls.

C. A Decision On How To Combine Disparate Estimates Of Average Per-Payphone Call Volumes Should Be Made In Light Of The Data Submitted

The Commission also inquires how it should use the data submitted, and specifically, whether the Commission should calculate a straight or weighted average of the various estimates submitted. *Further Notice* ¶ 13. Whether to use a weighted average and how to assign weights to various data submissions is a matter that cannot be decided in the abstract. Therefore, APCC will address the question of how to handle disparate estimates of average call volumes should be answered after reviewing the data that are submitted. It is clear, however, that to the extent that samples are weighted, the Commission should take into account, in the assignment of weights, the extent to which the samples represent “smart” payphones. As noted above, “smart” payphones are the only payphones to which per-phone compensation generally applies. *Id.* ¶ 14.

D. If The Commission Sets More Than One Per-Phone Rate, Each Rate Must Be Adequately Be Supported By Credible Data

The Commission inquires whether it should set more than one rate of per-phone compensation. Setting more than one rate may be appropriate if there is credible evidence showing that rates for different classes of payphones vary in a systematic, measurable way. However, the Commission should not set separate rates based on sketchy or unreliable data – such as the data on non-equal access area payphones that

the Common Carrier Bureau relied on in its 1998 orders.¹³ In those orders, the Commission determined average call volume for payphones in very-small-LEC territories and non-equal access areas based on very limited samples submitted by LECs – samples that differed greatly from each other and that were not at all representative of independent payphones.¹⁴

E. Currently, Approximately Five Percent Of Independent Payphones Receive Surrogate Payments

APCC's data show that currently, about five percent of the payphones APCC represents receive per-payphone compensation in lieu of per-call compensation.

III. THE COMMISSION SHOULD CLARIFY THAT THE PER-PAYPHONE RATE AUTOMATICALLY CHANGED WHEN THE COMMISSION REVISED THE PER-CALL RATE

In its decision setting a revised per-payphone compensation rate, the Commission should also address a currently disputed issue as to the amount of the *current* per-payphone rate. A number of carriers have continued to pay a per-payphone rate based on the old \$.24 per-call rate, even after the new per-call rate of \$.494 per call became effective. Further, AT&T, which initially did increase its per-payphone rate to

¹³ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893 (Com. Car. Bur. 1998) ("*Per-Phone Compensation Waiver Order*"); Order, 13 FCC Rcd 7303 (Enf. Div. 1998).

¹⁴ *Per-Phone Compensation Waiver Order* at 10911-13. APCC requested reconsideration of this order, and the Commission granted reconsideration in *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21279 ¶15 n. 23 (2002), *aff'd AT&T v. FCC*, 363 F.3d 504 (D.C. Cir. 2004).

take account of the increased per-call rate, has changed its position and is now attempting to “take back” the payments it made in the fourth quarter of 2004 based on the increased rate.

In APCC’s view, the Commission made clear in the *Fifth Order on Reconsideration* that each carrier’s per-phone compensation rate is calculated by multiplying the carrier’s market share percentage stated in Appendix C of the *Fifth Order on Reconsideration* by the applicable per-phone compensation rate. The per-phone compensation rate, in turn, is calculated by multiplying 148 (the amount of calls per phone) times the applicable per-call rate (currently \$.494). *Id.* ¶ 51. In its order adopting the \$.494 per-call rate, the FCC made clear that the new rate was a component of the per-phone rate. *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, ¶ 91 (2004).

It is unreasonable to assert, as AT&T has,¹⁵ that by listing the calculated amount as of October 2002 in Appendix C, the Commission froze per-phone payments at that amount, irrespective of any change in the per-call rate from which the per-phone rate is calculated. Not only is such a reading of the order illogical, it also is inconsistent with Section 276 of the Act. Section 276 requires that PSPs be compensated fairly for every completed call from their payphones. If PSPs receiving per-phone compensation are compensated at less than half the per-call rate, they can hardly be said to be receiving fair compensation.

¹⁵ See Letter to Albert H. Kramer and Jacob S. Farber, Dickstein Shapiro Morin & Oshinsky, from Martha Lewis Marcus, Senior Attorney, AT&T (June 14, 2005) (attached hereto as Attachment 1).

AT&T states that there are three components in the per-phone rate – (1) the per-call rate; (2) the average per-phone call volume; and (3) the percentage share assigned to each carrier. That is correct. AT&T also states that, so far, the Commission has made formal findings updating only one of the three components – the per-call rate. That too is correct. However, AT&T draws the wrong conclusion from these premises. When the Commission made formal findings to correct one of the three components of the rate – by increasing that component more than 100% -- that correction necessarily altered the per-phone rate to the extent of the change in that one component. Otherwise, the Commission would have allowed a rate to remain in effect after finding one component of that rate to be wrong by a factor of 100% – a clearly unreasonable and unlawful result.

AT&T asserts that it would be unfair to say that the Commission adjusted one of the variables in determining the surrogate without taking account of changes in the other variables. The distinction is that with respect to the per-call rate, the Commission changed that rate in a formal rulemaking. It is the purpose of the instant proceeding to address whether there should be changes in the other variables, and if and when the Commission modifies them, there would be a concomitant adjustment in the surrogate. But the carriers cannot arrogate to themselves the discretion to take account of variables set by a Commission rule before the Commission has finished the proceeding in which it is looking at those very variables.

Therefore, the Commission should clarify that the per-payphone rate in effect for each carrier as of the fourth quarter of 2004 is \$.494 times 148 calls times a carrier's Appendix C percentage share of the per-payphone rate unless and until the

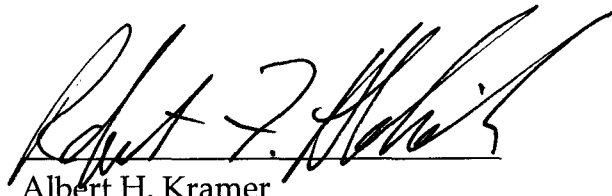
Commission makes adjustments in either the number of calls and/or the allocation of the surrogate payment between carriers.

CONCLUSION

The Commission should adopt a revised per-payphone rate in accordance with the foregoing comments.

Dated: June 27, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Albert H. Kramer

Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202)828-2226

*Attorneys for the American Public
Communications Council*

ATTACHMENT 1

Letter to Albert H. Kramer and Jacob S. Farber
Dickstein Shapiro Morin & Oshinsky, from
Martha Lewis Marcus, Senior Attorney, AT&T
(June 14, 2005)



Martha Lewis Marcus
Senior Attorney

Room 3A225
One AT&T Way
Bedminster, NJ 07921
908 532-1841
FAX 832 213-0169
marthamarcus@att.com

June 14, 2005

VIA FIRST CLASS MAIL AND FAX: (202) 887-0689

Mr. Albert H. Kramer
Mr. Jacob S. Faber
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street NW
Washington, DC 20037-1526

Re: Payphone Compensation Payment Correction

Dear Messrs. Kramer and Faber:

This letter is being provided in response to your letter of June 6, 2005 in which APCC Services ("APCC") objects to AT&T's planned correction of payphone compensation relating to overpayments of the per-payphone compensation amounts it paid to Payphone Service Providers ("PSPs") in the third and fourth quarters of 2004. For the reasons set forth below, AT&T disagrees with APCC's assertion that its planned payment correction is unreasonable and not supported by the Commission's existing orders.

Section 64.1301(e) of the Commission's Rules, 47 C.F.R. § 64.1301(e), governs per-payphone compensation for payments for the relevant pay periods.

"Post-intermediate access code and subscriber 800 calls. In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix C of the Fifth Order on Reconsideration and Order on Remand in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning April 21, 1999, in the amount listed in Appendix C for any payphone for any month during which per-call compensation for that payphone for that month was or is not paid by the listed entity." (Emphasis added.)



Mr. Albert Kramer
Mr. Jacob Faber
June 14, 2005
Page 2

Appendix C specifies that AT&T's share is \$11.98 per month based on a total rate of \$35.224 per payphone per month.¹ This share continues to be AT&T's payment obligation and there are no subsequent Commission rulings or orders that APCC can point to that have changed the amount of that obligation. That Section 64.1301(e) (with its cross-reference to Appendix C of the *Fifth Order*) remains in force and has not been amended is by itself a complete answer to APCC's contention that AT&T's per-phone compensation obligation has changed.

Moreover, APCC's contention that the amount of per-phone compensation has somehow changed (without any alteration of the governing regulation) is also contrary to the Commission's methodology for calculating this rate. There are three variables that the Commission uses to calculate the monthly per-payphone compensation rate for carriers such as AT&T. The first input is the per-call amount and the second is the average number of calls per compensable payphone. The resulting per-phone amount is then multiplied by a third critical variable – market share – to determine each IXC's per-phone payment obligation.

In connection with per-call compensation, the Commission modified the default rate for per-call compensation from \$.24 per call to \$.494 per call in its *Per Call Compensation Rate Order*.² The substantial increase in the per-call rate was based primarily on decreases in payphone usage:

“[P]ayphones in growing number are being removed from many locations because they no longer have sufficient call volumes to remain economically viable. The number of RBOC payphones has fallen by about 40 percent . . . APCC . . . also reports a significant decline in the number of deployed payphones.”³

At that time, although the Commission recognized the necessity of determining a new compensation rate for payphones that received per-payphone compensation, it refused to delay the per-call compensation rate decision and indicated it would issue a Further Notice of Proposed Rulemaking to fully develop a record to update the per-payphone compensation scheme.⁴ In other words, the Commission previously decided to change the per-call rate but not to make any changes to the per-phone rate until it could gather more information.

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (“*Fifth Order*”).

² *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd. 15636, ¶ 1 (2004) (“*Per Call Compensation Rate Order*”). Published in the Federal Register at 69 Fed Reg 52444-01 (August 26, 2004). The new rate for per-call compensation became effective September 27, 2004. 69 Fed Reg 52444-01.

³ *Per Call Compensation Rate Order*, ¶ 15.

⁴ *Id.* ¶ 91.

Mr. Albert Kramer
Mr. Jacob Faber
June 14, 2005
Page 3

To that end, the Commission recently released its Further Notice of Proposed Rulemaking ("*FNPRM*") to address other factors in the equation – e.g., the average number of compensable dial-around calls made from a payphone on a monthly basis. To ensure an accurate estimate of average call volumes for purposes of determining fair per-phone compensation, the Commission solicited updated average call volumes from the ILECs and other PSPs⁵ because, as previously mentioned, the Commission sought to quantify the trend that all parties recognized: the decline in the average number of calls made at payphones.⁶ Based on the data provided by the industry, the Commission expects to "calculate a new rate of per-payphone compensation by multiplying the average number of dial-around calls per payphone by the new \$.494 per-call compensation rate."⁷

APCC's contention – that the Commission has *already* altered the amount of per-phone compensation *sub silentio* – is fundamentally flawed. It is unreasonable for APCC to presuppose that it may benefit from the increased per-call rate, which was based on declining payphone volumes, while still relying on the higher 148 call volume per payphone. Indeed, APCC, by its own submissions, advocated for an increase in the per-call rate recognizing that call volumes have substantially decreased. Therefore, to merely substitute the higher per-call rate in the equation without lowering the average call volume would result in a major economic windfall for PSPs. Clearly, this is not what the Commission intended. To the contrary, the Commission recognizes that all relevant variables must be ascertained before it can determine a new per-payphone compensation rate. The Commission said it best:

"The two changes in inputs may very well offset each other; a lower average call volume may be offset by the higher per-call rate. It remains to be seen whether the net effect is to justify a lower per-payphone rate, a higher one, or possibly the same per payphone rate *that is in effect today*." (Emphasis added.)⁸

⁵ *In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, WC Docket No. 03-225, Further Notice of Proposed Rulemaking, 2005 WL 590007 (released March 14, 2005) ("*FNPRM*"). Published in the Federal Register at 70 Fed Reg 24740 (May 11, 2005).

⁶ *FNPRM*, ¶ 9.

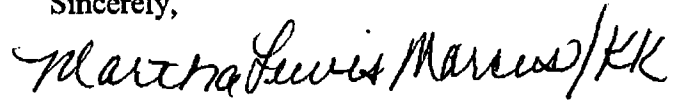
⁷ *Id.*

⁸ *Id.* n.36.

Mr. Albert Kramer
Mr. Jacob Faber
June 14, 2005
Page 4

Therefore, until such time as the Commission revises 47 C.F.R. § 64.1301(e), AT&T will continue to pay PSPs the payphone surrogate rate of \$11.98 per month as required by the Commission's rules.

Sincerely,

A handwritten signature in cursive script that reads "Martha Lewis Marcus/KK".

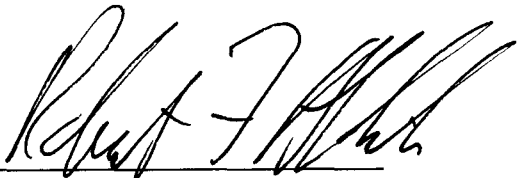
Martha Lewis Marcus

cc: Dan Le
Mike DelCasino

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2005, the foregoing Comments of the American Public Communications Council was sent via electronic mail to the following:

Natek Inc.
Portals II, 445 12th Street, S.W.
CY-B402
Washington, DC 20554
Natekinc@aol.com


Robert F. Aldrich